No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1959

No. .....

VERA GIOVANNETTI, *Petitioner*,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
RULES INVOLVED	4
STATEMENT	7
REASONS FOR GRANTING THE WRIT	15
CONCLUSION	27
APPENDIX	1a et seq.

CITATIONS

CASES

Bryan v. *Smith*, C.A. 7th 1949, 174 F. 2d 212 — 23

Buronum Co. v. *Nat. Alumenate Corp.*, D.C. Del. 70 Fed. Supp. 214-217 — 24

Hirsh v. *United States*, 15 F.R. Serv. 73 a.42, Case 1; 186 F. (2d) 524 (CA 6th, 1951) — 25

Lynch v. *Nat. Bondholders Corp.*, 2 F.R.D. 376 (1942) — 26

Piascik v. *British Ministry of War Transport*, 12 F.R. Serv. 73 a.43, Case 1, 90 F. Supp. 518 (D.C.S.D. N.Y. 1949) — 25

Rollison v. *Wash. Nat'l Ins. Co.*, 176 F. 2d 364 (4th Circuit, 1949) — 26

Walker v. *Spencer*, 123 F. 2d 347, 10th Circuit, 1941 — 26

Willoughby v. *Sinclair Oil and Gas Co.*, 15 F.R. Serv. 73 a.42, Case 3; 188 F. (2d) 902 (CA 10th, 1951) — 25

RULES

F.R. of Civil P.

41	17, 19, 22, 23, 24, 26, 27
59(a)	13, 17, 27
60(b)	13, 17
73	25

Rules of U. S. Ct. of App. for the D.C.C.

15	14, 15
16(b)	14, 15

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Vera Giovannetti, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit dismissing the appeals of the petitioner when she had good causes of action accepted by the court which had jurisdiction over all of the persons involved and the subject matter, yet was deprived of her Constitutional safeguards because of the improper application and interpretation of the Federal Rules of Civil Procedure.

The final judgment of the U. S. Court of Appeals for the District of Columbia Circuit was rendered on March 23, 1959 in case No. 14,844 which in turn related to case 14,299. (R/4 14844)

OPINIONS BELOW

No opinions were rendered . . . only a series of orders listed in the Appendix on which the Petition is based.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 23, 1959. (R. [illegible])

The jurisdiction of the Supreme Court of the United States is invoked under Article 3, Section 2 of the Constitution of the United States, Article VII of the Amendments to the Constitution and Title 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

Whether a District Court on remand with instructions to clarify an order by memorandum or order with a further notation that if the clarification is made by amending the orders certain rights would be reserved to the aggrieved party as to the taking of an appeal therefrom—may abuse this privilege by not clarifying or amending—but changing the order from permission to enter a non-suit without prejudice to one of dismissal with prejudice for want of prosecution.

Whether a District Court's memorandum supporting a changed order (out of term) may include points and authorities for application to the contention that the order was made under Rule 41(b) of the Federal Rules of Civil Procedure when in fact that particular section of the rule did not apply and cites cases that are completely inapplicable to the stated facts in the instant case.

Whether a United States Court of Appeals in remanding a cause for clarification and noting therein that if the clarification is made by a memorandum said Court will reinstate the appeal if a motion is filed by appellant within ten days after the filing of such memorandum—may, after the motion by appellant is timely filed, deny the motion without cause or explanation, and thus dismiss the cause.

Whether a United States Court of Appeals committed grievous error when on motion of appellees requesting reconsideration of an order on the grounds that appellant failed to comply with Rules 15 and 16(b) of the Court dismissed the appeal when, in fact, there was substantial compliance, and further permitted the District Court to compound the error by affirming its action in dismissing the cause with prejudice for want of prosecution when the record indicates just the opposite and that he did not abuse his discretion in doing so, although the action was contrary to the weight of opinions rendered in decisions concerning Rules 59 and 60 of the Federal Rules of Civil Procedure.

RULES INVOLVED

Rule 41(a)(1) of the Federal Rules of Civil Procedure provides:

> (a) VOLUNTARY DISMISSAL: EFFECT THEREOF.
>
> (1) *By Plaintiff; By Stipulation.* Subject to the provisions of Rule 23(e) and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service of the answer or (ii) by filing a stipulation of dismissal signed by all the parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.
>
> (2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.
>
> (b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this

rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Rule 56(d) of the Federal Rules of Civil Procedure provides:

> (d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Rule 59(a) and (b) of the Federal Rules of Civil Procedure provides:

> (a) GROUNDS. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.
>
> (b) TIME FOR MOTION. A motion for a new trial shall be served not later than 10 days after the entry of the judgment, except that a motion for a new trial on the ground of newly discovered evidence may be made

after the expiration of such period and before the expiration of the time for appeal, with leave of court obtained on notice and hearing and on a showing of due diligence.

Rule 60(b) of the Federal Rules of Civil Procedure provides:

> (b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order or proceeding, * * *

Rule 15 of the United States Court of Appeals for the District of Columbia Circuit:

> STATEMENT OF POINTS. Within 10 days after the filing and docketing of the record in this court, appellant shall serve on appellee or his attorney and file with the clerk a concise statement of the points on which he intends to rely on the appeal, unless he has filed a statement of points in the District Court under the provisions of subdivision (b) of Rule 12 of this Court.

Rule 16(b) of the United States Court of Appeals for the District of Columbia Circuit:

> (b) STATEMENTS OF APPELLANT AND APPELLEE AS TO CONTENTS OF JOINT APPENDIX. Within 10 days after the filing of the record appellant shall serve and file with the clerk a statement of the parts of the record he proposes to print in the joint appendix. Within 10 days after the filing of appellant's statement, appellee shall serve and file a statement of the parts of the record not included in appellant's statement which appellee desires to have printed in the joint appendix.

Article VII of the Amendments to the Constitution of the United States which reads in part:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * *"

STATEMENT

Petitioner filed a timely suit in the United States District Court for the District of Columbia against the respondents for wrongful death, malpractice and negligence in 1953 and from that time on, numerous motions and oppositions thereto were filed by both parties but three writings (memorandums and orders) dated February 1, 1957, February 27, 1957 and April 16, 1957 created the crisis leading up to plaintiff's oral motion of October 7, 1957 for a voluntary non-suit without prejudice and the granting of same, followed by the controversy we are now faced with in determining where and how the appeal(s) were mishandled by the Court of Appeals for the District of Columbia Circuit and subsequent incorrect actions committed by the District Court.

On February 1, 1957 the motions judge issued a memorandum reading in part: (~~Appendix~~ R. 11-12)

"There have been in this case actually what might be called three complaints filed. All three have been objected to as offending against Rule 8(e) F. R. Civ. P. in that they were vague, indefinite and prolix. Having in mind, however, (f) of the same rule, that all pleadings shall be construed as to do substantial justice, this Court concluded, when an attack was made by motion on the so-called second amended complaint, that despite a certain amount of circumlocution and vagueness, a cause of action had been stated" (para. 4, Second Amended Complaint), * * * pre-trial was had on October 11, 1956 at which time the pre-trial Judge directed * * * "counsel for plaintiff to draw a *consolidated* (italics supplied) plaintiff's pre-trial statement

which will state a cause of action * * * * * * despite the fact that this Court had already ruled that the plaintiff had stated a cause of action, inartistically drawn, to say the least, as it may have been. * * * This so called consolidated pre-trial statement was filed on November 2, 1956. * * * This was objected to by motions of summary judgments et al., and the Court addressing itself to the motion, concludes: The Motion as to summary judgment is denied without prejudice, but that with reference to alleged skill on the part of defendant surgeon is granted. (T. p. 31.) That part of the motion couched in the alternative asking for the striking of certain claims made by the plaintiff in the so-called pre-trial statement is granted. Such material if anything is mostly evidentiary. They are specifically; all matters relating to consent; the so-called use of the plaintiff's decedent for experimental and educative purposes; and the allegation that the decedent's condition was brought about by use of drugs.

"* * * To again repeat, what plaintiff actually is claiming here as a cause of action * * * is that there was caused to be brought about as a result of negligence upon the part of the defendants, individually and all three, needless intervention upon the body of the decedent, as a consequence of which he died because of the fact, as alleged, that he was a poor operative risk and the operation * * * should not have been performed at all. This being the claim, the defendants are entitled to have indicated specifically what evidence she intends to bring forward and adduce in its support against each or any of them, or all of them acting in concert, so that discovery procedures may be had as the rules provide. * * * The court's order therefore, is that the plaintiff furnish the defendants with the names of the medical witnesses, with their addresses and the subject matter to which their testimony will be addressed. * * *"

To this memorandum or order, the plaintiff filed a motion for reconsideration of defendants' motions for summary

judgment and other relief and for reconsideration of the court's memorandum stating: (R. 71, 72, 73)

1. That by the Memorandum Opinion filed herein, the Court has stricken vital issues from this cause, and has denied unto plaintiff a right to trial upon all issues, causes of action and merits of her case as set forth in her complaint.

2. That plaintiff is entitled to a jury trial herein upon all questions, and issues of negligence and malpractice set forth and claimed by her, in addition to the single issue and element left in the case, and permitted unto plaintiff to proceed herein and herewith, by the Court's Memorandum Opinion, namely, the single issue of whether or not the decedent was a "good operative risk," at the time defendants herein proceeded to operate on said decedent in this cause.

3. That the Court has stricken from plaintiff's Complaint all of the vitality contained in the same, and by the Memorandum Opinion, has denied unto plaintiff her day in Court upon all issues raised in and by her Complaint with respect to malpractice, negligence and all other issues apparent in her Complaint, and to which she is entitled to a jury trial herein.

4. And for other reasons, apparent on the record of this case, the Court should grant unto plaintiff all of the relief sought by this, her Motion for Reconsideration filed herein, and for other reasons to be presented at the hearing of this matter.

On February 27, 1957, the District Court sitting as a motions court (R. 75, 76, 77)

ORDERED that the defendants' motions for summary judgment so far as they seek a complete and final judgment on the merits against the plaintiff be and the same are hereby denied; that all claims against the defendant John P. Gallagher, M.D., challenging his skill, competence and technique in the performance of a burr-hole operation on plaintiff's decedent on November 13, 1952, be and the same are hereby stricken and dismissed; that the sole claim against the defendant John P. Gallagher, M.D., upon which the plaintiff may proceed to trial, except as hereinafter provided, is the

plaintiff's challenge to the medical wisdom and judgment of defendant John P. Gallagher, M.D., in deciding to operate at all upon plaintiff's decedent, and

IT IS FURTHER ORDERED that all claims of the plaintiff seeking damages for loss of consortium, grief or sorrow be and the same are hereby stricken and dismissed; that plaintiff's allegations against defendants Frank A. Finnerty, Jr., M.D., and Georgetown University Hospital and its agents, servants or employees, pertaining to the question of consent as to operative procedures, pertaining to the use of drugs in treating plaintiff's decedent and pertaining to the alleged use of plaintiff's decedent for experimental and educative purposes be and the same are hereby stricken and dismissed, and

IT IS FURTHER ORDERED that the plaintiff may proceed the trial, except as hereinafter provided, against defendants Frank A. Finnerty, Jr., M.D., and Georgetown University Hospital solely on the question as to whether or not plaintiff's decedent should, as a matter of good medical practice, have been subjected to the operative procedures performed upon him, but

IT IS FURTHER ORDERED that, since on February 1, 1957 this Court, by memorandum filed in this cause, directed the plaintiff to furnish within ten (10) days (10) the names of medical witnesses and their addresses who would testify that the performance of a burr hole procedure upon plaintiff's decedent was medical malpractice and a proximate cause of the death of plaintiff's decedent under penalty of dismissal, * * * the plaintiff's action will be, in its entirety, dismissed with prejudice, unless the direction of Court, set forth in the memorandum of Feb. 1, 1957 is complied with, within 30 days from that date hereof.

On April 8, 1957 petitioner filed a motion to amend the pre-trial statement to include all subjects of issue contained in the medical testimony furnished to defendants' counsel in compliance with the court's order of February 1, 1957, and on the same day filed a memorandum showing what nine medical witnesses would testify to. (R. 94-99)

On April 16, 1957 in a memorandum for the trial Judge, the motions judge made it a specific point to limit the issue to be tried at the trial to one item, namely, whether or not a burr hole operation was called for and noted that all others have been stricken and dismissed, calling the trial Judge's attention to the memorandum of February 1, 1957. Further the memorandum indicated that only **two** of the doctors should be allowed to testify, indicating that the testimony of the seven other medical witnesses was not to be heard.

The memorandum concluded that "Since she has now furnished the names of the individual witnesses as indicated and has gone another step forward in indicating the nature of their testimony, I can see no reason why this case should not be set for trial and it is not to be postponed under any circumstances because of lack of counsel, the plaintiff indicating in her motion that she is either more than ordinarily familiar with Court proceedings or has had the advantage of professional advise. * * *" (R. 57-58)

On October 7, 1957 petitioner appeared in Court on the day the cause was set for trial and in open court prayed for a non-suit without prejudice on the one issue left before the Court since summary judgments had been granted to the defendants on the real issues of the case which were originally set forth in the accepted complaint and determined in the pre-trial order of October 11, 1956. (R. 59-61)

The Court hearing counsel for the defendants stated "If it is dismissed for want of prosecution, it is dismissed without prejudice" * * * and then continuing, said:

"The only motion he makes before me is for the taking of a non-suit. A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be clean, without the statement."

Directing his attention to petitioner's counsel the Court advised him thusly:

"If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you don't want to do it, we will proceed to trial. * * * I think you had better withdraw your whole statement, that is my suggestion."

Thereupon petitioner's counsel stated:

"It is withdrawn and at the same time, the motion is made cleanly for a non-suit without prejudice."

The Court replied: **"I will grant that motion."**

An attempt by counsel for respondents to have placed on the record a statement that petitioner was not ready to go to trial was answered thusly by petitioner's counsel:

"Oh, no. We are limited to the issue because the summary judgment granted to the defendant was the meat of our action."

Finally, being pressed by respondents' counsel, the Court questioned petitioner's counsel: "Your statement is that upon the rulings of the Court, being limited to the one issue as to whether this operation should have been performed, you are not able to prove that case?"

Petitioner's counsel answered, "That is correct."

The Court then remarked, "And you are moving to dismiss for want of prosecution. That is what the effect of it is."

Counsel for petitioner replied, "I don't like the words 'for want of prosecution.'"

The Court concluded the hearing thusly: "Motion of Plaintiff to dismiss cause of action on the ground of inability to prove cause of action on issue limited by the Court is granted."

It would therefore seem to be plain that there was an oral motion granted to petitioner for a non-suit without

prejudice but listed by the court as a dismissal of the cause of action on the ground of inability to prove cause of action on issues limited by the Court, but at no time was there an agreement or a positive decision by the Court that this was a dismissal with prejudice on the ground of want of prosecution.

On October 8, 1957 respondents' counsel drew up an order pertaining to the hearing of the previous day and because of the wording therein, petitioner's counsel refused to accept or agree to same but nevertheless it was signed by the trial judge, over the objection of petitioner's counsel. (R. 14-29).

A motion to reinstate the claim under Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure was denied on November 14, 1957. Thereupon a timely appeal was filed as to the two orders—the one of October 8 and the one of November 14, 1957. (R. 14-29)

The brief for appellant was filed and the bond posted, but nowhere in the record is there a record of the respondents Georgetown University Hospital and Finnerty ever filing a brief in reply. Nevertheless, on October 1, 1958 the Court of Appeals heard arguments on the case and on October 6, 1958 issued a remand to the District Court, reading thusly:

> This cause came on for consideration on the transcript of the record from the District Court, and was argued by counsel.
>
> After consideration whereof, it is ORDERED by the court that this cause be, and it is hereby, remanded to the District Court for the purpose of clarifying its orders of October 8, 1957, and November 14, 1957, in respect of: (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, so that expression is used in the Federal Rules of Civil Procedure.

If clarification is made by a memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within 10 days after the filing of such memorandum. If clarification is made by an order of the District Court amending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom.

On October 22, 1958, in response to the remand order, the District Court filed *not only* a memorandum *but an order too*, noting that the cause was dismissed with prejudice for want of prosecution under Rule 41(b) of the Fed. Rules of Civil Procedure, citing cases as its authority thereof. (R. 14)

Within the time set for filing a motion to have the Court of Appeals reinstate the appeal as they said they would do, petitioner obeyed the mandate but on December 15, 1958, without any reason given, received a copy of an order of the Court of Appeals that the motion to reinstate was denied. (R. 24) But, since the District Court also filed an order and since the remand order stated that the aggrieved party could appeal from that order, your petitioner filed her appeal therefrom and on January 30, 1959 the Court of Appeals allowed the brief filed in case No. 14,299 to be the brief in 14,844 with a notation that petitioner could file a supplemental brief by January 31, 1959. This order was received by petitioner on January 31, 1959. (R. 25)

On February 2, 1959 respondents' counsel (for Georgetown University Hospital and Finnerty) requested the Court to reconsider its motion of January 30, 1959 and called the Court's attention of the failure on the part of petitioner to obey or conform to Rule 15 and 16(b) of said court.

On March 23, 1959, the Court issued its final ruling from which your petitioner now prays for relief in the form

of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit. (R. 14-14b4)

REASONS FOR GRANTING THE WRIT

The rulings of the Courts below are in conflict with decisions in numerous other circuits on the pertinent questions pertaining to the Federal Rules of Civil Procedure involved herein. This arm of the general federal law which is of constant and continuing importance should not be misinterpreted if litigants in federal civil cases are to be assured of true justice.

The rulings made are contrary to the plain meaning of the Federal Rules of Civil Procedure as they now stand and frustrates the purpose of the rules which were promulgated in the first instance to insure substantial justice for all seek same.

The acceptance of respondents allegations that the petitioner had not complied with Rules 15 and 16(b) of the Court of Appeals rules in case No. 14,844 was erroneous and without foundation since the record formally recognizes the fact that the appeal in its entirety is complete because by order of the Court of Appeals the record in 14,299 was accepted as the record as 14,844. Substantial injustice was committed thereby and your petitioner was deprived of her opportunity to have her day in court and to have her case heard on its merits and decided by a jury as her complaint prayed for.

Petitioner proceeded to appeal in 14,844 only because the remand of October 6, 1958 (Appendix 11a) stated that if either party was aggrieved by the action of the District Court in clarifying its own orders of October 7, 1957 and November 14, 1957 * * * "any party aggrieved thereby may

take an appeal therefrom." This was already done in 14,299 and the action initiated in 14,844 was repetitious but done in order to comply with the order of remand. No new issues were involved nor were any important rights acquired by the defendants within the period of time between October 7, 1957 and October 22, 1958.

This, in light of another part of the remand order which read: "If clarification is made by a memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within 10 days after filing of such memorandum"—leaves your petitioner in a quandry because when your petitioner complied with that part of the order, the Appeals Court in a one sentence opinion dated December 15, 1958 ruled: "Upon consideration of appellant's motion to reinstate this appeal, it is

ORDERED by the court that the aforesaid motion is denied."

How, if ever, is a litigant going to be assured of being able to obtain justice when a Court states in one breath "If clarification is made by a memorandum of the District Court (which was accomplished) the appeal *will* be reinstated by this court on motion of appellant if filed within 10 days after the filing of such memorandum"—and that motion is timely filed—then in the next breath—after thee motion is filed—denies the reinstatement request.

Petitioner is prepared to go along with the action taken by the Appeals Court if the remand read "* * * this appeal *may* be reinstated by this court on motion etc. * * *" but when the order reads "* * * *will* be reinstated * * *" a reason for the change of mind is in order—otherwise appellants in similar cases will be frustrated whenever a remand contains a positive statement on the part of an appeals court as to what it will do if certain actions are complied with, knowing from the decisions rendered herein that

the words "may" and "will" will take on new meanings in the field of judicial discretion, and that the force of the word "will" will not have its true power exemplified as we know it now in connection with the laws and rules of our judicial system.

By this action, substantial injustice has been done to your petitioner, especially since the Appeals Court compounds its erroneous rulings herein by affirming a District Court's incorrect and erroneous interpretation of the Federal Rules of Civil Procedure as it pertains to Rules 41, 59 and 60.

On October [redacted] 1957 when petitioner through counsel, in open court stated (App. 19)

"The plaintiff requests and prays that a voluntary non-suit be entered as to the only issue before the Court today, namely, whether or not a burr-hole operation in the circumstances was called for.

"I would like the record to show the reasons for the voluntary non-suit, to-wit, because of the fact that Judge McGuire, who was not the pre-trial judge, granted summary judgment to defendants on the real issues of the case which were originally set forth in the original complaint, namely, for wrongful death, negligence and malpractice, and allowed in the original pre-tiral order of October 11, 1956, which called for a consolidated pre-trial statement and, noted by Judge McGuire in his memorandum of February 1, 1957.

"I quote from Judge McGuire's memo opinion wherein he stated: 'A cause of action has been stated in paragraph 4 of the second amended complaint.'

"Then at a hearing requested by the defendants, Judge McGuire granted summary judgment in favor of defendants, as noted further in his memorandum granting certain portions and striking other portions.

"We attempted to remedy this by filing a motion for leave to file an amended complaint, setting forth the original causes of action more articulately and clearly.

"Judge Tamm denied this motion and Judge McGuire denied the plaintiff's motion when she was represented pro se.

"We are therefore in the position, according to Judge Tamm and Judge McGuire, of being limited to the proof of the one issue left, namely, the only issue in the case is whether or not a burr-hole operation in the circumstances was called for.

"This narrow opinion changed the original cause of action filed by the plaintiff and accepted by the Court. This, obviously, is a minor and irrelevant issue, and because of this action, we do not want to waste the time of the Court when the main issues have been ruled out.

"In compliance with Judge McGuire's memorandum of February 1, 1957, (R. 71-72) the plaintiff submitted her medical statements ordered by the Court and later, in March of 1957, filed a further motion to amend the pretrial statement and/or the complaint in order that the plaintiff may include all subjects at issue contained in the medical information submitted in compliance with the said memorandum of February 1, 1957:

"Judge McGuire in ruling, stated on March 19, 1957: (R. 98-99)

"'This is a matter for the trial court. If it is sought to expand an order, the same is denied and the same is sufficiently broad in the circumstances.'

"'Therefore, under the circumstances, faced with the fact that summary judgment has been granted on factual issues and evidentiary issues and issues of fact in evidence, it would be a gross waste of time to try this case so bound, and, in our opinion, a gross miscarriage of justice.

"Therefore, too, since the motion to file an amended complaint and because of the emasculation of the causes of action, this present motion under Rule 41 of the Federal Rules of Civil Procedure is respectfully presented."

Thereupon, respondents requested of the Court that it rule that the case be dismissed for want of prosecution or, if plaintiff wishes to dismiss, the Court should exercise its power under the rule to require dismissal with prejudice. The Court responded, "If it is dismissed for want of prosecution, it is dismissed without prejudice.

* * * Yes, it would be without prejudice. I question my right to dismiss it with prejudice. *I quite agree that the case should be dismissed on the motion* entirely aside from any statement that has been made by plaintiff's counsel. *If plaintiff wants to come in and make a motion to dismiss,* I will grant it, but I don't want any of this irrelevant matter, which I feel is entirely irrelevant as far as this motion is concerned, attached to the motion.

"I quite agree if there is to be a statement filed by counsel for the plaintiff—they have a right to file any statement they wish, I suppose—but they certainly should prepare it in writing and serve a copy upon counsel, but I question my right to require dismissal with prejudice. * * *

"I don't think I can dismiss a case with prejudice against his consent. I don't think I have a right to do that. **The only motion before me is for the taking of a non-suit. A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be clean, without the statement.** The record speaks for itself, and I really don't see that you should be coming in here making a statement of this kind.

Underscoring and/or italics supplied by petitioner for emphasis.

"* * * **If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you do not want to do it, we will proceed to trial.***

"* * * I think you had better withdraw your whole statement, that is my suggestion."

MR. STEMPIL: **It is withdrawn and, at the same time, the motion is made cleanly for a non-suit without prejudice.**

THE COURT: **I will grant that motion.***

MR. CONNELLY: We would like to have it dismissed for want of prosecution, if the Court please.

THE COURT: Well, it amounts to same thing. I will dismiss it for want of prosecution.

MR. CONNELLY: Will the record show the plaintiff is not ready to go to trial?

MR. STEMPIL: Oh, no; we are limited to the issue because of the summary judgment granted to the defendant was the meat of our action.

THE COURT: Your statement is that upon the rulings of the Court, being limited to the one issue as to whether this operation should have been performed, you are not able to prove that case?

MR. STEMPIL: That is correct.

THE COURT: And you are moving to dismiss for want of prosecution. That is what the effect of it is.

MR. STEMPIL: **I don't like the words "for want of prosecution."***

MR. CONNELLY: For want of ability to proceed.

THE COURT: For want of ability to prove their case.

MR. STEMPIL: Under that one issue.

THE COURT: Under the issue that has been limited by the rulings of the Court.

MR. STEMPIL: That is right. Just so it is on the record.

THE COURT: Yes. Motion of plaintiff to dismiss cause of action on ground of inability to prove cause of action on issues as limited by the Court is granted.

* Underscoring supplied by petitioner for emphasis.

Following that when respondents counsel presents the order in connection herewith, reading: (R. 6, 14-19)

> "This cause having come before the Court for trial this 7th day of October 1957, and plaintiff's counsel having made an oral motion to dismiss on the ground of inability of plaintiff to prove a cause of action on the issues as limited by the Court and said motion having been argued and discussed by both counsel for the plaintiff and defendants, it is, by the Court, this 8th day of October, 1957:
>
> ORDERED, That the said cause be, and is hereby, dismissed.
>
> /s/ LUTHER W. YOUNGDAHL
> *Judge*

your petitioner refused to sign or consent to same because it did not contain the wording requested by petitioner namely—that a voluntary non-suit without prejudice was granted or dismissed without prejudice.

Over the continued objections of your petitioner that the order was incorrectly drawn, same was signed by the Court below.

This action, from all indications, was noticed too by the Appeals Court and after hearing argument on the case **despite the fact that respondents Georgetown University Hospital and Finnerty did not comply with the Court's rule requiring the filing of a brief for said appellees,** remanded the cause to the District Court (App. 9) for the purpose of clarifying its orders of October 8 and November 14, 1957 in respect of (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, as that expression is used in the Federal Rules of Civil Procedure. The Court further noted that if clarification was

made by memorandum of the District Court, the appeal "*will*"[1] be reinstated by this court on motion of appellant filed within 10 days after the filing of such memorandum. If clarification is made by an order of the District Court amending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom."

So, in response to that remand, on October 22, 1958, the District Court filed not only a memorandum but an order, too. The order now read: (R. 17-19)

> ORDERED: That the cause be dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Federal Rules of C.P.
>
> /s/ LUTHER W. YOUNGDAHL
> *Judge*

This action from any point is a gross miscarriage of justice.

How could that Court in clear conscience create such a new and different situation when it clearly stated on October 7, 1957, in open court that

"If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you don't want to do it, we will proceed to trial * * * I think you had better withdraw your whole statement, that is my suggestion."

Thereupon counsel for petitioner stated, "It is withdrawn, and at the same time, the motion is made cleanly for a non-suit without prejudice."

THE COURT: I will grant that motion.

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[1] Emphasis supplied by petitioner.

There is nothing in the record to indicate that the petitioner was guilty of lack of willingness to prosecute and from the record cannot be accused of failing to proceed or being guilty of want of prosecution, and when the District Court, out of term, tears apart petitioner's request for justice and the Appeals Court accepts this action, what else can petitioner do but appeal to this Honorable Court to correct such a gross miscarriage of justice occasioned by an erroneous interpretation of the Federal Rules of Civil Procedure?

Under 41(b) the rule provides that a *defendant* may move for a dismissal of an action or of any claim against him, if the plaintiff fails to prsecute or to comply with these rules or any order of court.

Such is not the case here.

The *plaintiff*, not *the defendants*, moved for a non-suit without prejudice * * * and it was granted, not at the plaintiff's instance alone but upon order of the court too and upon such terms and conditions as the court deemed proper. The last sentence of 41(a)(2) specifically reads:

"Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

How and under what authority could the District Court justify its subsequent action when 41(b) is not applicable as perceived by the record of the case.

Besides, in *Bryan* v. *Smith*, C.A. 7th 1949, 174 F2d 212, the Court ruled:

> "After dismissal, the action is no longer pending in the Court and no further proceedings in the action are proper. After dismissal of an action, the court is without jurisdiction and has no right to render any judgment either for or against plaintiff and the parties are out of court for every purpose other than to carry out

the order of dismissal or non-suit into effect or vacate or modify it."

Your petitioner claims that the District Court's order of October 22, 1958, failed to modify the order of October 7, 1957; it *changed* the order in violation of Rule 41(a)(2) and incorrectly applied its out of time ruling under 41(b).

Nowhere in the record is there any justification for the District Court's changed ruling showing that the petitioner was guilty of any act or omission for which the court could properly dismiss the action with prejudice for want of prosecution, and any act rendered in the form of an order or judgment is a decision against the law and an abuse of discretion.

Since a court takes judicial notice of its own records, but requires that one who relies on proceedings records must call them to the court's attention, this is respectfully done now, specifically to the proceedings of October 7, 1957 noting that the non-suit affected no right or remedy of the parties and that no decision to this day has been rendered on the merits.

"The plaintiff has not had a full and free opportunity of presenting all facts pertinent to the controversy to a jury as a matter of right."[2]

Therefore, when the Court of Appeals in its order of March 23, 1959 states that the trial judge did not abuse his discretion in dismissing for want of prosecution under 41(b) this constitutes manifest error that can be corrected only by this Honorable Court in the interest of justice and fair play and bound under its duty to protect the rights of its citizens who seek redress in the Courts of the United States as provided for in the Constitution under Article VII of the Amendments to said Constitution.

---

[2] Buronum Co. v Nat. Alumenate Corp. D.C. Del. 70 F. Supp. 214-217.

"In suits at common law, where the value shall exceed twenty dollars, the right of trial by jury shall be preserved * * *"

In the instant case, your petitioner never had her day in court nor was she ever allowed to present her case or have it heard on its merits and allow the jury to decide the facts.

In *Pisciotti v. British Ministry of War Transport*, 12 F.R. Serv. 73 a.43, Case 1, 90 F. Supp. 518 (D.C.S.D.N.Y. 1949) the Court there ruled that

> "The filing of a notice of appeal perfects the appeal and the District Court thereafter *has no authority* to proceed further with the case or *to dismiss it for want of prosecution*." (Italics provided by petitioner for emphasis.)

In *Willoughby v. Sinclair Oil and Gas Co.*, 15 F.R. Serv. 73 a.42, Case 3, 188 F (2d) 902 (C.A. 10th 1951) the Court therein stated the rule thusly:

> "Filing of a notice of appeal and cost bond deprives the District Court of jurisdiction to set aside its judgment."

In our petitioner's case the appeal was timely filed and the cost bond posted, yet the Appeals Court allowed the District Court, *not to modify* an order *but to change* it to the complete prejudice of her rights and contrary to stated law.

In spite of the ruling in *Hirsh v. United States*, 15 F.R. Serv. 73 a.42, case 1, 186 F (2d) 524 (C.A. 6th, 1951) where in the Court laid down the interpretation of the rule under 73 of the F.R. of C.P. stating that

> "While an appeal is pending the District Court has no power to entertain a proceeding to modify the judgment appealed from" . . .

yet the Court of Appeals in the instant case accepted a changed order which deprived the petitioner of any chance for her day in court and to have her case heard on its merits by a jury.

As to the memorandum of the District Court filed on October 22, 1958 (ORR 14-19), justifying its action under

41(b) the cases cited are not applicable to the present cause of action. In *Walker* v. *Spencer*, 123 F 2d 347, 10th Circuit, 1941 a situation existed where the cause was dismissed for lack of diligence on the part of the plaintiff in trying to have the case tried. This was not so in your petitioner's case and nowhere in the record is there anything contrary to this contention.

In the cited case of *Rollison* v. *Wash. Nat'l Ins. Co.*, 176 F2d 364 (4th Circuit, 1949), the plaintiff was afforded several opportunities by the trial court to present his case in its most favorable aspect, but in the instant case the record definitely indicates the contrary. So this case too does not apply. In the *Lynch* v. *Nat. Bondholder's Corp.*, 2 F R D 376 (1942) plaintiff having submitted a trial brief and proposed special questions for submission to the jury on each disputed fact, and on the trial date the jury was present and defense counsel and witnesses were ready for trial, the plaintiff's counsel made a statement that he did not care to proceed further **and on motion of defendant,** the cause was dismissed with prejudice for want of prosecution. Such was not the situation in the instant case. There was no jury present—no trial brief had been submitted, no special questions were presented for submission to the jury on each disputed issue of fact and at no time did your petitioner state that she did not *care* to proceed further. In fact, she made it more than plain that it was her desire to make and did in fact make a motion for a non suit without prejudice under Rule 41 of the Fed. Rules of Civil Procedure. Of course it was under 41(a)(2) and could not be under 41(b) since it was being made by the *plaintiff* and not the defendant as required by 41(b).

Therefore, the citations used by the District Court in its memorandum of October 22, 1958 are inapplicable and incorrect as applied to this case.

As to the denial to the petitioner of her motion to rein-

state the cause of action on the grounds of misinterpretation, mistake, inadvertence, excusable neglect, under Rule 60(b) of the Fed. Rules of Civil Procedure, the motion was made in time, and petitioner was under the impression that this rule under (b) (1) did not limit the power of the court to entertain an action to relieve a party from a judgment, or an order, or proceeding, and that the court had a right, in the interest of justice to reinstate under the circumstances noted, and allow the plaintiff to have his day in court.

The District Court also ignored plaintiff's request under Rule 59(a)(2) where the court is permitted to grant a new trial to any or all of the parties in an action tried without a jury, for any of the reasons for which new trials have heretofore been granted in suits in equity in the Courts of the United States, and incorporated this ruling in its order of October 22, 1958 and again erroneously applied Rule 41(b) of the Fed. Rules of Civil Procedure.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

I. William Stempil
Attorney for Petitioner.

July, 1959

APPENDIX

Washington, D. C.,
October 7, 1957.

The above-entitled matter came on for hearing before the Honorable LUTHER W. YOUNGDAHL, United States District Judge, at 10:00 o'clock a.m.

Proceedings

THE DEPUTY CLERK: Vera Giovanetti vs. Georgetown University Hospital, et al., Civil Action No. 4963-53.

MR. STEMPIL: Your Honor, I appear for the plaintiff.

The plaintiff requests and prays that a voluntary non-suit be entered as to the only issue before the Court today, namely, whether or not a burr-hole operation in the circumstances was called for.

I would like the record to show the reasons for the voluntary non-suit, to-wit, because of the fact that Judge McGuire, who was not the pretrial judge, granted summary judgment to defendants on the real issues of the case which were originally set forth in the original complaint, namely, for wrongful death, negligence and malpractice, and allowed in the original pretrial order of October 11, 1956, which called for a consolidated pretrial statement and, as noted by Judge McGuire in his memorandum of February 1, 1957.

I quote from Judge McGuire's memo opinion wherein he states:

"A cause of action has been stated in paragraph 4 of the second amended complaint."

Then, at a hearing requested by the defendants, Judge McGuire granted summary judgment in favor of the de-

fendants, as noted further in his memorandum granting certain portions and striking other portions.

We attempted to remedy this by filing a motion for leave to file an amended complaint setting forth the original causes of action more articulately and clearly.

Judge Tamm denied this motion and Judge McGuire denied the plaintiff's motion when she was represented pro se.

We are, therefore, in the position, according to Judge Tamm and Judge McGuire, of being limited to the proof of the only one issue left, namely, the only issue in the case is whether or not a burr-hole operation in the circumstances was called for.

This narrow opinion changed the original cause of action filed by the plaintiff and accepted by the Court. This, obviously, is a minor and irrelevant issue and, because of this action, we do not wish to waste the time of the Court when the main issues have been ruled out.

In compliance with Judge McGuire's memorandum of February 1, 1957, the plaintiff submitted her medical statements ordered by the Court and later, in March of 1957, filed a further motion to amend the pretrial statement and/or the complaint in order that the plaintiff may include all subjects at issue contained in the medical information submitted in compliance with the said memorandum of February 1, 1957.

Judge McGuire, in ruling, stated on March 1, 1957:

> "This is a matter for the trial court. If it is sought to expand an order, the same is denied and the same is sufficiently broad in the circumstances."

Therefore, under the circumstances, faced with the fact that summary judgment has been granted on factual issues and evidentiary issues and issues of fact in evidence, it

would be a gross waste of time to try this case so bound and, in our opinion, a gross miscarriage of justice.

Therefore, too, since the motion to file an amended complaint was denied and because of the emasculation of the causes of action, this present motion under Rule 41 of the Federal Rules of Civil Procedure is respectfully presented.

MR. WELCH: If the Court please, I think counsel should be instructed that if, in any sense of the word, he wants that speech made a part of the record, that he prepare it in writing, submit it to the Court and furnish copies to opposing counsel.

This case has been filed since October, 1953. It has gone through a long and tortuous process of pleadings before the court and several changes of counsel. I don't know, but I assume Mr. Stempil filed a praecipe entering his appearance this morning.

THE COURT: I just had it handed to me this morning.

MR. WELCH: I haven't seen a copy of the praecipe entering his appearance and did not know, until we arrived here at court, that the last preceding counsel have apparently abandoned the case.

MR. STEMPIL: Your Honor, that is not correct.

MR. WELCH: We feel that, in view of the circumstances of this case at the present time, which it would take Your Honor some several minutes to review in checking back on the record, the plaintiff should be required at this stage, if they intend to dismiss their case, to dismiss it with prejudice.

This is not a situation where, as in the filing of a complaint and in due course of time, learning that there had been some changes in circumstances which may make plaintiff well advised to either change because of action or to dismiss and refile. This thing has been fought out before

the courts on almost every conceivable point in the complaint and at every conceivable procedural idea of new counsel to change the cause of action or to change the rulings of the Court and get the case back into the original stage of the original complaint.

At this late day, I think it is entirely improper, and I think it is within the discretion of the Court to permit a simple non-suit or require a dismissal with prejudice.

MR. CONNOLLY: May I be heard, if the Court please?

THE COURT: Yes, certainly.

MR. CONNOLLY: If Your Honor please, I speak on behalf of two defendants, Georgetown University Hospital and Dr. Frank A. Finnerty.

This case should be, in my opinion, dismissed for want of prosecution or, if the plaintiff wishes to dismiss, the Court should exercise its power under the rule to require dismissal with prejudice.

THE COURT: If it is dismissed for want of prosecution, it is dismissed without prejudice.

MR. CONNOLLY: I don't think so, Your Honor.

THE COURT: Yes, it would be without prejudice. I question my right to dismiss it with prejudice.

I quite agree that the case should be dismissed on the motion entirely aside from any statement that has been made by plaintiff's counsel. If plaintiff wants to come in and make a motion to dismiss, I will grant it, but I don't want any of this irrelevant matter, which I feel is entirely irrelevant as far as this motion is concerned, attached to the motion.

I quite agree if there is to be a statement filed by counsel for the plaintiff, they have a right to file any statement they wish, I suppose, but they certainly should prepare it in writing and serve a copy upon counsel, but I question my right to require dismissal with prejudice.

MR. CONNOLLY: I think Your Honor has the right under the rules. In other words, he can take a voluntary non-suit either with the consent of counsel, which we do not extend to him, or with the approval of the Court.

THE COURT: Yes.

MR. CONNOLLY: Any other dismissal is with prejudice.

THE COURT: I don't think I can dismiss a case with prejudice against his consent. I don't think I have any right to do that.

The only motion he makes before me is for the taking of a non suit.

A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be clean, without the statement. The record speaks for itself, and I really don't see that you should be coming in here making a statement of this kind.

I think what you are doing, by making this statement, is inferentially attacking other judges of this court. I think it is entirely out of place.

If you have any grievance from any rulings, you know what your remedy is. It is not to make a statement in the record. I do not see the purpose of it. I think it is beside the point completely.

If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you don't want to do it, we will proceed to trial.

MR. STEMPEL: If Your Honor please, there was no indication in my mind or any desire to cast any aspersions

THE COURT: Hearing it objectively, I don't see any other purpose.

MR. STEMPEL: I withdraw that part of it

THE COURT: I think you had better withdraw your whole statement, that is my suggestion.

MR. STEMPIL: It is withdrawn and, at the same time, the motion is made cleanly for a non-suit without prejudice.

THE COURT: I will grant that motion.

MR. CONNOLLY: We would like to have it dismissed for want of prosecution, if the Court please.

THE COURT: Well, it amounts to the same thing. I will dismiss it for want of prosecution.

MR. CONNOLLY: Will the record show the plaintiff is not ready to go to trial?

MR. STEMPIL: Oh, No; we are limited to the issue because the summary judgment granted to the defendant was the meat of our action.

THE COURT: Your statement is that upon the rulings of the Court, being limited to the one issue as to whether this operation should have been performed, you are not able to prove that case?

MR. STEMPIL: That is correct.

THE COURT: And you are moving to dismiss for want of prosecution. That is what the effect of it is.

MR. STEMPIL: I don't like the words "for want of prosecution."

MR. CONNOLLY: For want of ability to proceed.

THE COURT: For want of ability to prove their case.

MR. STEMPIL: Under that one issue.

THE COURT: Under the issue that has been limited by rulings of the Court.

MR. STEMPIL: That is right. Just so it is on the record.

THE COURT: Yes.

Motion of plaintiff to dismiss cause of action on the ground of inability to prove cause of action on issues as limited by the Court is granted.

(Thereupon, the hearing was concluded.)

Order of Dismissal

This cause having come before the Court for trial this 7th day of October, 1957, and plaintiff's counsel having made an oral motion to dismiss on the ground of the inability of plaintiff to prove a cause of action on the issues as limited by the Court and said motion having been argued and discussed by both counsel for the plaintiff and defendants, it is, by the Court, this 8th day of October, 1957:

ORDERED, That the said cause be, and is hereby, dismissed.

[Filed October 8, 1957]

/s/ Luther W. Youngdahl — Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VERA GIOVANETTI, ETC., PLAINTIFF,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., DEFENDANTS

Order

This cause came on to be heard at this term upon plaintiff's "Motion to Reinstate Cause of Action Dismissed on Motion of Plaintiff Through Error in Evidence and Misinterpretation of the Rules," and in consideration thereof and the transcript of the proceedings before this Court at the time of the dismissal of said action, and the prior order of this Court of October 8, 1957, and it appearing to the Court that this Court's prior order of October 8, 1957 and the transcript of proceedings accurately reflect the nature of the proceedings and the action taken, it is by the Court this 14 day of November, 1957:

ORDERED that plaintiff's motion be and the same is hereby denied.

[Filed Nov. 14, 1957]

/s/ Luther Youngdahl
Judge

[Certificate of Service]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

District Court Civil No. 4953-58

JANUARY TERM, 1958

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Edgerton, Chief Judge, in Chambers.

Order

Upon consideration of appellant's motion for leave to file a cash cost bond in the sum of $250.00, and it appearing that no objections have been filed, it is

ORDERED that appellant be, and she is hereby, allowed to to file in the District Court a cash cost bond in the amount of $250.00 on or before March 15, 1958.

Dated: March 10, 1958.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

APRIL TERM, 1958

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Danaher, and Burger, Circuit Judges, in Chambers.

Order

On consideration of the motion of appellees Georgetown University Hospital and Frank A. Finnerty to dismiss appeal or to the judgment of the District Court, it is

ORDERED by the court that the motion be, and it is hereby, denied.

Per Curiam.

Dated: July 11, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

APRIL TERM, 1958

Filed July 11, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Danaher, and Burger, Circuit Judges, in Chambers.

Order

On consideration of the motion of appellee John P. Gallagher, to dismiss appeal or to affirm the judgment of the District Court, it is

ORDERED by the court that the motion be, and it is hereby, denied.

Dated: July 11, 1958. Per Curiam.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

APRIL TERM, 1958

Filed July 11, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Danaher, and Burger, Circuit Judges, in Chambers.

Order

On consideration of the motion of appellees Georgetown University Hospital and Frank A. Finnerty for an order directing the clerk to accept brief for filing, and it appearing that said brief has been lodged with the clerk, and it further appearing that said brief is in support of said appellees' motion to dismiss appeal, it is

ORDERED by the Court that the clerk be, and he is hereby, directed to file the brief of appellees Georgetown University Hospital and Frank A. Finnerty in this case, and treating said brief as a motion to dismiss, the motion to dismiss is denied, and it is

FURTHER ORDERED that the time for filing appellees' brief be, and it is hereby, extended to and including August 5, 1958.

Per Curiam.

Dated: July 11, 1958.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

SEPTEMBER TERM, 1958

Filed October 6, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Washington and Burger, Circuit Judges.

Order

This cause came on for consideration on the transcript of the record from the District Court, and was argued by counsel.

After consideration whereof, it is ORDERED by the court that this cause be, and it is hereby, remanded to the District Court for the purpose of clarifying its orders of October 8, 1957, and November 14, 1957, in respect of: (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, as that expression is used in the Federal Rules of Civil Procedure.

If clarification is made by a memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within 10 days after the filing of such memorandum. If clarification is made by an order of the District Cour tamending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom.

Per Curiam.

Dated: October 6, 1958.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VERA GIOVANETTI, ETC., PLAINTIFF,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., DEFENDANTS

CA. 4953-53

Memorandum

Upon remand of this case on October 6, 1958, the Court carefully reconsidered and studied the transcript of October 7, 1957.

Counsel for plaintiff made no objection to having the case set for trial on October 7, 1957, and appeared in Court apparently ready for trial on that date. When the case was called for trial, plaintiff's counsel made a statement to the Court that he could not prove a cause of action if he were to be restricted to those issues remaining after the pre-trial of Judge Kirkland on October 11, 1956 and the partial summary adjudication of Judge McGuire on February 27, 1957. Accordingly, counsel for the plaintiff moved for a dismissal without prejudice, counsel for defendants objected to a dismissal without prejudice and requested a dismissal with prejudice for want of prosecution.

In view of the time the case had been pending, and in view of the numerous matters that had been litigated in this case prior to October 7, 1957 and the important rights acquired by the defendants as a result of the progress of this pre-trial litigation, and in view of the statement made by counsel for plaintiff that he could not prove a case on the issues so limited, it is the opinion of this court that the case should be dismissed with prejudice for want of prosecution.

Walker v. *Spencer* 123 F2d 347 10th Circ. 1941: *Lynch* v. *National Bondholders Corporation* 2 FRD 376 (1942); *Rollison* v. *Wash. Nat'l Insurance Co.* 176 F2d 364 (4th Cir. 1949); Rule 41(b) of the Fed. Rules of Civil Procedure; 28 USC following sec. 2072.

An order to that effect has this day been rendered.

/s/ Luther W. Youngdahl

Judge

October 22, 1958.

CA. 4953-53

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VERA GIOVANETTI, ETC., PLAINTIFF,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL.

Order

This cause having been remanded from the U.S. Court of Appeals for the District of Columbia Circuit for the purpose of clarifying the orders of Oct. 8, 1947 and November 14, 1957, pertaining to this cause, it is by the court this 22 day of October, 1958

ORDERED: That the cause be dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Fed. Rules of Civil Procedure.

Luther W. Youngdahl
Judge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,299

SEPTEMBER TERM, 1958

Filed December 15, 1958, Joseph W. Stewart, Clerk.

VERA GIOVANETTI, ADMINISTRATRIX OF THE ESTATE OF HENRY G. GIOVANETTI, DECEASED, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Washington and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of appellant's motion to reinstate this appeal, it is

ORDERED by the court that the aforesaid motion is denied.

Per Curiam.

Dated: December 15, 1958.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,844

SEPTEMBER TERM, 1958

VERA GIOVANETTI, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Prettyman, Chief Judge, in Chambers.

Order

Upon consideration of appellant's motion for leave to file a brief, time having expired, and to allow the brief in case No. 14,299, *Giovanetti* v. *Georgetown University Hospital*, et al., to be accepted as a brief in this case and for leave to file an additional brief, and it appearing that no objections have been filed, it is

ORDERED that the appellant's brief previously filed in case No. 14,299, is deemed to be appellant's brief in this case and that appellant is allowed to and including January 31, 1959 to file a supplemental brief in this case.

Dated: January 30, 1959.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,844

SEPTEMBER TERM, 1958

District Court Civil Action No. 4953-53

VERA GIOVANETTI, APPELLANT,

v.

GEORGETOWN UNIVERSITY HOSPITAL, ET AL., APPELLEES.

Before: Wilbur K. Miller, Washington and Burger, Circuit Judges, in Chambers.

Order

Upon consideration of the motion of appellees Georgetown University Hospital and Frank A. Finnerty, M.D., to reconsider the order of January 30, 1959, allowing appellant an extension of time to file her brief and of their motion to dismiss this appeal and of appellant's motion for further extension of time to file additional brief, time having expired, and it appearing that appellant has failed to comply with Rule 15 and 16(b) of this court and that our review of this case indicates that no injury will be done by dismissal of the appeal, c/f/ *Smith* v. *Pollin*, 89 U.S. App. D.C. 407, 190 F2d 657, *cert denied*, 342 U.S. 878, rehearing denied, 342 U.S. 907 (1951); and we find that the trial judge did not abuse his discretion in dismissing for want of prosecution, it is

ORDERED by the court that this appeal is dismissed and that appellees shall recover from appellant their taxable costs on appeal and have execution therefor.

Per Curiam.

Dated: March 23, 1959.

FILE COPY

SUPREME COURT, U.S.
FILED
AUG 17 1959
JAMES R. BROWNING, Clerk

No. 237

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

VERA GIOVANETTI, *Petitioner*

v.

GEORGETOWN UNIVERSITY HOSPITAL, et al., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 237

VERA GIOVANETTI, *Petitioner*

v.

GEORGETOWN UNIVERSITY HOSPITAL, et al., *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition for a writ of certiorari should be summarily denied. The reasons advanced in support of the petition are a jumble of confusion which require more space to answer than the nature of the petition deserves.

However, something like a precise history of the proceedings below is in order. This action was instituted for damages for the wrongful death of petitioner's decedent due to alleged medical malpractice. When the depositions of all the principal parties had been taken, the respondents moved in the District

Court for summary judgment. Following a hearing, partial summary judgment was entered on behalf of the respondents pursuant to Rule 36 (d), F.R.C.P. The court left to be tried a single factual issue. Despite repeated efforts by the petitioner to have the court reconsider and change its ruling pertaining to the partial summary judgment, the order remained effective.

In due course petitioner's case came on for trial. When the case was tried petitioner requested permission to take "a voluntary non-suit". (App. 1a) There followed the proceedings set forth in Appendix 1a-6a. As may be seen by a reading thereof, respondents' counsel opposed the petitioner's request, thereby foreclosing a voluntary dismissal under Rule 41 (a)(1), F.R.C.P. Feeling that petitioner's gambit was another attempt to avoid the impact of the prior adverse ruling by the District Court, respondents suggested that if the action was to be dismissed, the court in the exercise of its discretion should require a dismissal with prejudice under Rule 41(a)(2), or dismiss the action for want of prosecution in accordance with Rule 41(b), in view of the admission made by petitioner's counsel that he was unable to prove a cause of action under the one issue left open for trial.[1] (App.

[1] A previous memorandum of the pretrial judge to the trial judge dated April 16, 1957 said, *inter alia:*

"I can see no reason why this case should not be set for trial, and it is not to be postponed under any circumstances because of lack of counsel, the plaintiff indicating in her motion that she is either more than ordinarily familiar with Court proceedings or has had the advantage of professional advice.

"This case has been pending in this court since October 27, 1953 and it is the type of action by virtue of its circumstances that lends itself to the clogging of the docket and criticism direction toward the court."

4a) The trial judge at first mistakenly thought that he did not have the power to require a dismissal with prejudice. (App. 4a) When petitioner's counsel objected to the words "for want of prosecution", the court modified the language of its ruling to call it a dismissal "on the ground of the inability of plaintiff to prove a cause of action on the issues as limited by the court". (App. 6a, 7a). An order embodying this ruling was signed October 8, 1957. Reconsideration failed on November 14, 1957. (App. 7a)

An appeal was then taken from these orders. (T. 80—No. 14,299) In the course of this appeal petitioner did not question the earlier rulings of the District Court which granted respondents partial summary judgment. Petitioner questioned only the action taken by the trial court in dismissing her action.[2]

Following the receipt of her brief, the respondents moved in the Circuit Court of Appeals to dismiss the appeal as frivolous and submitted a brief in support thereof. (R. 14,299, pp. 74-78) The motions to dismiss were denied by the Court of Appeals and the case was set down for oral hearing. (R. 14,299, pp. 79, 80). The court, without opinion, remanded the case to the District Court:

> ". . . for the purpose of clarifying its orders of October 8, 1957, and November 14, 1957, in respect of: (1) which provision or provisions of the Federal Rules of Civil Procedure form the basis thereof; and (2) whether its orders are with or without prejudice, as that expression is used in the Federal Rules of Civil Procedure." (App. 11a)

[2] Petitioner's brief in the Court of Appeals was not docketed as part of the record in support of her petition. Respondents, however, have lodged with the Clerk of this Court a copy of that brief.

This order of remand of the Court of Appeals of October 6, 1958 further provided:

> "If clarification is made by memorandum of the District Court, this appeal will be reinstated by this court on motion of appellant filed within ten days after the filing of such memorandum. If clarification is made by an order of the District Court amending either or both of the orders of October 8, 1957, and November 14, 1957, any party aggrieved thereby may take an appeal therefrom." (App. 11a)

On remand the District Court reconsidered the matter and on October 22, 1958 ordered the case "dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Fed. Rules of Civil Procedure". (App. 13a) The District Court also filed a memorandum opinion supporting and explaining this order. (App. 12a)

Petitioner then filed a notice of appeal on November 1, 1958 from this order of the District Court of October 22, 1958. (T. 14,844, p. 95) On the same date she also filed a motion in the Court of Appeals in her previous appeal to reinstate that appeal. (R. 14,299, p. 83)

Since the District Court had complied with the order of remand and had entered a new order, petitioner's recourse was obviously to pursue her new appeal rather than to reinstate the old. Presumably, petitioner also thought so for on December 10, 1958 she docketed her record in the Court of Appeals in pursuance of her previously filed notice of appeal and a new number was assigned her case, No. 14,844. Observing this action, the Court of Appeals on December 15, 1958 denied petitioner's motion to reinstate her

appeal in No. 14,299. Petitioner then, however, took no further steps toward prosecuting her appeal in No. 14,844 until January 20, 1959 when she filed a "Motion for Leave to File Brief, Time Having Expired, And, Motion to Allow Brief in 14,299 To Be Accepted as Brief in the Instant Action (14,844) and Motion to Grant Appellant Additional Time to Add Volume 2 to Brief in 14,299—At a Time No Later Than January 31, 1959". (R. 14,844, p. 1)[3] She stated in her moving papers that Volume 2 was intended to indicate to the court the errors of the trial court—not in granting partial summary judgment—but in its explanatory memorandum and order of October 22, 1958. (R. 14,844, p. 2)

The Court of Appeals, rather precipitously assuming there was no opposition, granted this motion before respondents could reply. (R. 14,844, p. 3) Accordingly, a motion by the respondents for a reconsideration was prepared and filed on February 3, 1959 in which respondents opposed the petitioner's request for relief pointing up her failure to comply with the rules governing appeals. (R. 14,844, p. 6)

Meanwhile, no second volume of a brief was filed by petitioner on January 31, 1959, nor did she make any attempt to file such a brief thereafter. Accordingly, there was nothing before the court other than the issues raised by appellant in her brief in No. 14,299, as to which the court had already acted. She had indicated

[3] Up until this time petitioner had not served upon respondents a designation of record on appeal as required by Rule 75(a) F.R.C.P.; had not served a statement of points on which she intended to rely on appeal as required by Rule 15 of the Rules of the Court of Appeals and had not filed a cost bond on appeal as required by Rule 73(c) F.R.C.P.

in her moving papers for permission to file a second brief that she intended only to attack the District Court's order of clarification.

The Court of Appeals kept the respondents' motion for reconsideration *sub judice* until March 23, 1959. Meanwhile, there had been no attempt by petitioner to supply the court with a second brief or to remedy her omissions in the course of perfecting her appeal. On the latter date, the Court of Appeals dismissed the appeal in No. 14,844 for a failure to comply with Rules 15 and 16(b) of the rules of that court. The court further found that the District Court had not abused its discretion in dismissing the plaintiff's action for want of prosecution as specified in the order of October 22, 1958. (R. 14,844, p. 14) It is this order which petitioner seeks to review by her petition for writ of certiorari.

The foregoing rather complex history has been brought about largely because of petitioner's own conduct. At every step her papers have either been late, not filed at all, not served upon respondents or abundantly confusing.

She protests in her current petition that the merits of her case have never been heard on appeal. By this she presumably means that the validity of the earlier rulings granting partial summary judgment have not been tested on appeal. But she has never sought to raise these alleged merits or taken steps to present them in an orderly manner before any court.

The only complaint she has made in her two appeals is that she should have been permitted to take a "voluntary non-suit" on October 7, 1957 instead of having it dismissed for want of prosecution.

Petitioner, however, is engaged in idle controversy. As disclosed by her original complaint, her husband died on November 22, 1952. By virtue of the provisions of the District of Columbia Wrongful Death Act, D. C. Code (1951) § 16-1202, her action could have been brought only during the course of one year following death. Had she been granted a voluntary non-suit, useless litigation would have followed. Its re-institution after October 7, 1957, would have been barred by limitations. Accordingly, this court is now being imposed upon by a useless petition. The trial court was eminently justified in dismissing for want of prosecution. Under the circumstances the petition for a writ of certiorari should be denied.

Respectfully submitted,

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BEFORE THE

Supreme Court of the United States

OCTOBER TERM
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No. 237

VERA GIOVANNETTI, *Petitioner*,

v.

GEORGETOWN UNIVERSITY HOSPITAL ET AL.

PETITION FOR A REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page
Petition for rehearing for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit	1
Jurisdiction	1
Reasons for Petition for Rehearing	2
Conclusion	6

TABLE OF CASES CITED

Butler v. Eaton, 141 U.S. 240, 35 L.Ed. 713, 11 S.C. 985, anno. 81 ALR 312, 719	5
Bryan v. Smith, CA 7th 1949, 174 F2d 212	2
Cone v. West Virginia Paper Company, 330 U.S. 212, 91 L.Ed. 849, 67 S.Ct. 752	2
Hammond Packing Co. v. Arkansas, 212 U.S. 322	5
Home Owners Loan Corp. v. Huffman, 134 F2d 314, 317 (footnote)	3
Hovey v. Elliott, 167 US. 409	5
Jones v. S.E.C., 298 U.S. 1, 19-20	3
Matyas v. Feddish, 9 F.R. Serv. 52(b)(1) 4 FRD 395 D.C. M.D. Pa. 1945	6
Pleasant v. Fants, 22 Wall 116, 122	3
Societe Internationale, etc, v. Rogers, Atty. General, etc, 357 U.S. 197, 2 L.Ed. 1255, 78 S.Ct. 1087	4
U. S. v. Lyman, 125 F2d 67, 138 F2d 509 (ftnte)	3

Before The

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No. 237

Vera Giovannetti, *Petitioner*,

v.

Georgetown University Hospital, et al.

PETITION FOR A REHEARING ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now the Petitioner and presents this petition for rehearing on the petition for a writ of certiorari filed in this case.

JURISDICTION

The petition for certiorari was filed on July 21, 1959 and denied on October 12, 1959. This petition is filed within the time prescribed by the rules of this Court as extended and noted by an order of the Chief Justice dated November 9, 1959 to December 6, 1959.

REASONS FOR PETITION FOR REHEARING

In applying for this rehearing, your petitioner reiterates each and every ground set forth in the original petition and places special emphasis as to:

1. The ruling of the District Court which is in direct conflict with decisions in other circuits and this Court as it pertains to Rule 41(b) of the Federal Rules of Civil Procedure.

In *Bryan* v. *Smith*, C.A. 7th 1949, 174 F2d 212, the ruling was:

> "After dismissal, the action is no longer pending in the Court and no further proceedings in the action are proper. After dismissal of an action, the Court is without jurisdiction and has no right to render any judgment for or against plaintiff and the parties are out of court for every purpose other than to carry out the order of dismissal or non-suit into effect or vacate or modify it."

This action was contrary to the Court of Appeals order of October 6, 1958 which asked for a *clarification*—when the District Court on October 22, 1958 changed the non-suit and dismissal action without prejudice to one with prejudice for lack of prosecution.

2. The ruling of the District Court which is contrary to the plain meaning of Rule 41 of the F.R.C.P. as it pertains to the rights of a *plaintiff* on a motion for a non-suit or a dismissal without prejudice.

In the case of *Cone* v. *West Virginia Paper Company*, 330 U.S. 212, 91 L.Ed 849, 67 S.Ct. 752, at page 217, Justice Black delivered the opinion of the Court wherein he stated:

> "Take a case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time, a litigant might know or have reason to believe that he could fill the crucial gaps in the evidence. Traditionally, a plaintiff in such a dilemma has unqualified right,

upon prepayment of costs, to take a non-suit in order to file a new action after further preparation unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit. *Pheasants* v. *Fant*, 22 Wall 116, 122; *Jones* v. *S.E.C.*, 298 U.S. 1, 19, 20 and cases cited. Rule 41(a)1 preserves the right of the Plaintiff to a dismissal without prejudice prior to the filing of the defendant's answer. And after the filing of the answer, Rule 41(a)(2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as to the court deems proper.'"[1]

In the instant case now before the Court, the trial court on October 7, 1957—in open court said:

"If plaintiff wants to come in and make a motion to dismiss, I will grant it, but I don't want any of this irrelevant matter, which I feel is entirely irrelevant as far as this motion is concerned, attached to the motion. The only motion before me is for the taking of a non-suit. A motion to dismiss without prejudice, that is what it amounts to, and I think that should be done and I think it should be done and I think it should be clean, without the statement. * * * If you want to come in here clean and make a motion to dismiss, I will grant it without such a statement. If you do not want to do it, we will proceed to trial. * * * I think you had better withdraw your whole statement, that is my suggestion. MR. STEMPEL: It is withdrawn and, at the same time, the motion is made cleanly for a non-suit without prejudice. THE COURT: I will grant that motion. (Appendix 5a-6a Petition for writ of certiorari.)

Therefore under this Court's ruling in the *Cone* case,

[1] Rule 41(a)(2) Federal Rules of Civil Procedure has been interpreted as authorizing a plaintiff to dismiss his action "without prejudice" where the court believes that although there is a technical failure of proof there is nevertheless a meritorious claim." Report of Proposed Amendments to Rules of Civil Procedure (1946) 64; see *United States* v. *Lyman*, 225 F2d 67, 138 F2d 509; *Home Owners Loan Corp.* v. *Huffman*, 134 F2d 314, 317.

supra, it is plain that the petitioner herein was granted a dismissal without prejudice "upon such terms and conditions as the court deemed proper."

Yet on October 22, 1958, the trial court in response to a mandate from the Court of Appeals to clarify the Order of October 8, 1957 by memorandum or order as to how it applied the pertinent Federal Rules of Civil Procedure herein

> ORDERED: That the cause be dismissed with prejudice for want of prosecution in accordance with Rule 41(b) of the Federal Rules of Civil Procedure. (App. 13a—Pet. for writ of certiorari.)

Nowhere in the record is there any indication that Plaintiff was guilty of unwillingness to prosecute or to proceed because of want of prosecution.

3. In *Societe Internationale, etc. v. Rogers, Attorney General, etc.*, 357 U.S. 197, 2 L.Ed. 2, 1255, 78 S.Ct. 1087, in an action of certiorari to the United States Court of Appeals for the District of Columbia Circuit, Justice Harlan stated:

> "Because this decision (of the District Court directing final dismissal of the action) raised important questions as to the proper application of the Federal Rules of Civil Procedure, we granted certiorari. 355 U.S. 812. * * * Rule 41(b) is concerned with involuntary dismissals and reads in part: For failure of the Plaintiff to prosecute or to comply with these rules or any order of the court, *a defendant* (italics supplied by petitioner) may move for dismissal of an action or a claim against him. * * * There is no need to resort to Rule 41(b) which appears in that part of the rules concerned with *trials* and which lacks such specific references to discovery."

> > "Further, that rule [(41)(b)] is, on its face, appropriate only as a *defendant's* remedy." (Emphasis supplied by petitioner herein.)

> "* * * The opinions of this court in *Hovey* v. *Elliott*, 167 U.S. 409, and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, establish that there are constitutional limitations upon the powers of the courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause. * * * Very certainly, substantial constitutional questions are provoked by such action."

In your petitioner's case, she made the motion to dismiss or non-suit without prejudice since she was unable to prove the case, or what was left of it, as she was limited to by another judge in a previous court hearing, that limitation destroying plaintiff's original complaint against her wishes —but nevertheless the district court, "on terms and conditions as the court deemed proper," on October 8, 1957 dismissed the action without prejudice.

4. The district court's lack of jurisdiction and power to render *any* judgment for or against the plaintiff after the original dismissal of the action "without prejudice."

In *Butler* v. *Eaton*, 141 U.S. 240, 35 L.Ed. 713, 11 S.Ct. 985, anno. 81 ALR 312, 719, the Supreme Court said:

> "The right to have a judgment set aside because it is based upon a judgment which is subsequently reversed is authoritatively recognized. * * * It is apparent from an inspection of the record that the whole foundation of that part of the judgment which is in favor of the defendant is, to our judicial knowledge, without any validity, force or effect, and ought never to have existed."

By first dismissing without prejudice — which was a final action — and then a year later issuing a new order dismissing with prejudice for want of prosecution under 41(b), the District Court acted beyond the scope of its authority and only this this Honorable Court can set aside that last judgment as void, without any validity, force or effect and secure for the petitioner herein the relief prayed for.

5. Petitioner sought relief under Rule 52(b) of the Federal Rules of Civil Procedure and when the District Court issued a new order on October 22, 1958 dismissing the action with prejudice on the grounds of want of prosecution it was bad law and contrary to decisions in other circuits.

In *Matgas* v. *Faddish*, 9 FR. Serv. 52(b) (1) 4 F.R.D. 385, D.C. M.D. Pa. 1945, the court there ruled:

> "The purpose of Rule 52(b) is to enable the court to amend its findings or make additional findings in order to clarify matters for the appellate court's better understanding of the decision. *It does not provide for a reversal of judgment, or a finding of contrary fact.* * * *"

6. On October 2, 1959, while the petition for a writ of certiorari was being considered by this Court, pursuant to a motion made by petitioner to the Court of Appeals prior to petition filed here—to allow the petitioner to file a motion to reopen or rehear appellant's argument or to order the district court to reinstate the case on the grounds that it issued a void judgment and that the defendant Georgetown University Hospital and Finnerty in violation of the Court of Appeals own rule 32(b)—did not file a brief for appellee yet was allowed to argue the case—the Court of Appeals denied the motion. (Before Wilbur K. Miller, Washington and Burger, Circuit Judges, in chambers, with a note that Circuit Judge Burger did not participate in this order.)

CONCLUSION

For all of the foregoing reasons and with the prayer that the original petition be reread in light of the reasons set forth herein, the petition for rehearing is prayed for now with the hope that it will be granted in the interest of justice and that upon further consideration of the order of

October 12, 1959 denying the petition for a writ of certiorari be revoked, and that a writ of certiorari be issued.

I. William Stempil
Attorney for Petitioner

I, I. William Stempil, of counsel for Vera Giovannetti, the petitioner herein do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for the purpose of delay.

(s) I. William Stempil